fraudulent conveyance despite the obvious intent of the assignor and assignee.[57]

New York authorizes garnishment of ten percent of the debtor's wages, future as well as current, if he earns in excess of a statutory minimum.[58] The garnishments rank in order of service, and costs are incurred but once.

Even more realistic would be the establishment of a basic exemption for a single wage earner — *e.g.*, $25 per week — and adding to that a sum—*e.g.*, $10 per week—for each member of his family dependent upon him for support. A single man or woman, who now has no exemption, would receive some protection. A married man with two children could retain $55 per week exempt from liability for debt under this proposal. Any excess could be levied upon in its entirety, or upon an increasing scale as the income bracket increases if such a provision were thought desirable. Protection against fluctuating financial conditions and changes in the purchasing power of the dollar could be attained in part, at least, by tying the basic exemption to the Cost of Living Index of the United States Bureau of Labor Statistics.[59]

Adoption of some such plan protects the debtor in dire financial straits but prevents the higher salaried person from using the exemption as a shield from the payment of his just debts.

Essential to the successful operation of this or any other means of subjecting a part of earnings to debt is an amendment of the garnishment laws to permit garnishment of wages to be earned in the future.

---

[57] See Lehr v. Switzer, 213 Iowa 658, 239 N.W. 564 (1931) (renunciation of a devise after a creditor had levied upon and sold the property); Saunders v. Wilson, 207 Iowa 526, 220 N.W. 344 (1925) (attempt to levy on a contingent remainder held inoperative). In Coomes v. Finegan, 233 Iowa 448, 453, 7 N.W.2d 729, 731 (1943) the court said a creditor could have no interest in a naked possibility which the devisee had released during the lifetime of decedent. See Bump v. Augustine, 154 N.W. 782 (1915).

[58] N.Y. CIV. PRAC. ACT § 684. The minimum is now $30 per week in cities of a quarter million or over and $25 per week in smaller cities.

[59] Compare this proposal with that contained in Note, 36 IOWA L. REV. 76, 88 (1950); for a practitioner's viewpoint, see Note, 36 IOWA L. REV. 525 (1950).

CIVIL REMEDIES FOR INTOXICATION

Section 129.2 of the Iowa Code of 1950, a section entitled Civil Action, creates a statutory civil liability for injuries to certain named persons "by any intoxicated person", or "in consequence of the intoxication" of any person. This liability is imposed against any person who shall, by illegally selling or giving intoxicating liquors, cause the intoxication. In full it reads as follows:

> Every wife, child, parent, guardian, employer, or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any person who shall, by selling or giving to another contrary to the provisions of this title [Title VI, Alcoholic Beverages] any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages.

In spite of its broad implications and forceful nature, this statute has been strangely idle for the past four decades. Consequently, in discussing the problems which arise under the statute, it will be necessary to do so in the light of cases decided in Iowa years ago. Where issues have not been developed in Iowa, Illinois cases will be referred to, in which jurisdiction there is a statute nearly identical to our own section 129.2.[1] Briefly stated, the problems to be discussed here are: (1) Classes of injuries, (2) Who may sue, (3) Who is liable, (4) Sales or gifts giving rise to liability, (5) When is one "intoxicated," (6) Must there be proximate cause, (7) Defenses, and (8) Judgment as lien on premises.

CLASSES OF INJURIES. Iowa and jurisdictions with similar statutes have come to classify the injuries for which there are remedies into two classes: injuries done "by any intoxicated person," and injuries resulting "in consequence of the intoxication" of any person. The most important reason for the distinction is in regard to the causal relationship requisite for a cause of action.

The expression "by any intoxicated person" is construed to mean all injuries caused by "an affirmative act of the intoxicated person,"[2] and includes acts where he disables or kills himself to the injury of his dependents;[3] or acts which do harm to third persons

---

[1] ILL. REV. STAT. c. 43, § 135 (1951).

[2] See 2 IOWA L. BULL. 224, 225 (1916).

[3] *E.g.*, Lee v. Hederman, 158 Iowa 719, 138 N.W. 893 (1912) (accidental death); Bistline v. Ney Bros., 134 Iowa 172, 111 N.W. 422 (1907) (suicide); Huff v. Aultman & Schuster, 69 Iowa 71, 28 N.W. 440 (1886) (accidental death).

to the injury of such third persons,[4] or the dependents of such third persons.[5]

Injuries "in consequence of the intoxication" of any person would be indirect injuries which arise without any affirmative act of the intoxicated person other than the drinking itself.

Iowa has not experienced the number of cases based on injuries "by any intoxicated person" as have other jurisdictions, largely due to the fact that no cases have reached the Supreme Court since the advent of the automobile and automobile accidents involving intoxication. The few which exist usually involved injuries incurred "in consequence of the intoxication" as well.[6]

WHO MAY SUE. The right of action is given to "every wife, child, parent, guardian, employer, or other person" injured, but not to the one intoxicated. Clearly a child has a right of action for loss of support;[7] so has an illegitimate child without allegation or proof of recognition.[8] *Jarozewski v. Allen*[9] was a case of a father recovering for loss of support which had been contributed in the past by his son. Since, as stated before, Iowa has had but few cases of injuries "by any intoxicated person," there have not been many cases where recovery was sought by unrelated "other person[s]."[10]

PERSONS LIABLE. The statute says any person who sells or gives the intoxicating liquor contrary to the provisions of Title VI of the Code is liable, which includes a servant as well as the master.[11]

Where all the injuries alleged arose from one fit of intoxication, there would be joint and several liability against all who sold or gave intoxicating liquor,[12] though there could be only one recovery.[13] But where there are a number of separate intoxi-

---

[4] *E.g.*, League v. Ehmke, 120 Iowa 464, 94 N.W. 938 (1903) (injury to health from threats of harm); Ward v. Thompson, 48 Iowa 588 (1878); Kearney v. Fitzgerald, 43 Iowa 580 (1876) (spent plaintiff's money and destroyed her property); Woolheather v. Risley, 38 Iowa 486 (1874) (wrongful sale of plaintiff's horse); see Applegate v. Winebrenner, 67 Iowa 235, 237, 25 N.W. 148, 149 (1885) (battery on plaintiff).

[5] Kaus v. American Surety Co., 199 Fed. 972 (N.D. Iowa 1912) (father permanently disabled while riding in auto as guest); Lee v. Hederman, 158 Iowa 719, 138 N.W. 893 (1912) *semble* (defendant caused team of horses to run away; father killed in fall from wagon).

[6] Lee v. Hederman, *supra* note 5; League v. Ehmke, 120 Iowa 464, 94 N.W. 938 (1903); Huff v. Aultman & Schuster, 69 Iowa 71, 28 N.W. 440 (1886); Applegate v. Winebrenner, 67 Iowa 235, 25 N.W. 148 (1885); Ward v. Thompson, 48 Iowa 588 (1878); Kearney v. Fitzgerald, 43 Iowa 580 (1876); Woolheather v. Risley, 38 Iowa 486 (1874).

[7] *E.g.*, Kaus v. American Surety Co., 199 Fed. 972 (N.D. Iowa 1912).

[8] *See* Goulding v. Phillips & Lansing, 124 Iowa 496, 498, 100 N.W. 516, 516 (1904).

[9] 117 Iowa 632, 91 N.W. 941 (1902).

[10] *E.g.*, Kearney v. Fitzgerald, 43 Iowa 580 (1876) (status uncertain).

[11] Worley v. Spurgeon, 38 Iowa 465 (1874).

[12] Kaus v. American Surety Co., 199 Fed. 972 (N.D. Iowa 1912); Faivre v. Mandercheid, 117 Iowa 724, 90 N.W. 76 (1902); Kearney v. Fitzgerald, 43 Iowa 580 (1876).

[13] Putney v. O'Brien, 53 Iowa 117, 4 N.W. 891 (1880).

cations,[14] or where habitual drunkenness is alleged,[15] there is only several liability of each defendant for damages he alone caused.

In *Cox v. Newkirk*[16] the court distinguishes the situation where the defendant merely contributes to the *habit of drinking* without intoxication, though leading to habitual drunkenness, from the case of causing the habitual drunkenness itself. Contribution to the habit without intoxication does not create any liability.[17]

As suggested in the listing of problems to be discussed, there is an ancillary remedy available under section 126.15 of the Code.[18] Under this section a judgment rendered in an action under section 129.2 may be made a lien upon the premises where the intoxicating liquor was provided. Therefore, the owner of the premises may be joined as defendant when litigating the liability of the vendor or donor of the liquor, though they are not joint tortfeasors.[19]

Sureties on bonds to "pay any damages any person may sustain, or which may result from the drinking of any wine or beer, or any liquor got or procured at his saloon or place of business" may be joined as defendants,[20] or may be sued alone.[21] In either event, the surety is responsible for both actual and exemplary damages.[22]

Under section 129.2, ordinary rules of agency do not apply to a defendant partnership, and it is immaterial that one partner acts without the consent of the other.[23]

---

[14] Huggins v. Kavanagh, 52 Iowa 368, 3 N.W. 409 (1879) (instruction that defendant liable for all damages if impossible to separate them held erroneous); Jewett v. Wanshura, 43 Iowa 574 (1876); La France v. Krayer, 42 Iowa 143 (1875).

[15] Bellison v. Apland, 115 Iowa 599, 89 N.W. 22 (1902); Flint v. Gauer, 66 Iowa 696, 24 N.W. 513 (1885); Richmond v. Shickler, 57 Iowa 486, 10 N.W. 882 (1881) (apparently the court considered this case as one of habitual drunkenness, and it was cited by *Flint v. Gauer, supra*). Ennis v. Shiley, 47 Iowa 552 (1877); Hitchner v. Ehlers, 44 Iowa 40 (1876); *cf.* Cox v. Newkirk, 73 Iowa 42, 43-4, 34 N.W. 492, 493 (1887), where the court approved a contradictory instruction but expressly gave it a harmless construction; *but cf.* League v. Ehmke, 120 Iowa 464, 471, 94 N.W. 938, 940 (1903).

[16] 73 Iowa 42, 43-4, 34 N.W. 492, 493 (1887).

[17] League v. Ehmke, 120 Iowa 464, 94 N.W. 938 (1903). *See* Arnold v. Barkalow, 73 Iowa 183, 185, 34 N.W. 807, 808 (1887).

[18] Apparently the lien can be applied to personal property which was used for the purpose of selling or giving the intoxicating liquor. For discussion of the lien, see text at note 99 *infra*.

[19] McVey v. Manatt, 80 Iowa 132, 45 N.W. 548 (1890).

[20] Breeding v. Jordan, 115 Iowa 566, 88 N.W. 1090 (1902).

[21] Kaus v. American Surety Co., 199 Fed. 972 (N.D. Iowa 1912); Knott v. Peterson, 125 Iowa 404, 101 N.W. 173 (1904).

[22] Breeding v. Jordan, 115 Iowa 566, 88 N.W. 1090 (1902); Richmond v. Shickler, 57 Iowa 486, 10 N.W. 882 (1881). Exemplary damages are discussed in the text at note 89 *infra*.

[23] Mathre v. Story City Drug Co., 130 Iowa 111, 106 N.W. 368 (1906).

In an unusual case, it was held that section 129.2 could not apply to a common carrier which delivered liquor by C.O.D. shipment.[24]

SALES OR GIFTS GIVING RISE TO LIABILITY. An action may be maintained against any person who sells or gives *intoxicating liquors* contrary to the provisions of Title VI of the Code.

Clearly, sales of "vinuous, fermented, spiritous, or alcoholic liquor, except beer" are unlawful unless sold by state liquor stores or special distributors.[25] From the beginning of the statutory civil action in 1862, until 1873, no action would lie for intoxication caused by sales of beer since such sales were not unlawful.[26] Section 1539 of the Code of 1873[27] was construed as superadding beer to the arbitrary classification of intoxicating liquors when sold to *persons intoxicated, or in the habit of becoming intoxicated, or to minors.*[28] From that time on, many actions have been founded on intoxication by beer.[29]

The revision of the liquor control laws which was necessary after the repeal of prohibition led to a new definition of *intoxicating liquors* in Title VI[30] to allow the sale of beer privately by permit. The new definition purports to exclude all beer and other malt liquors of less than four percent alcohol by weight from the class of intoxicating liquors. While it purports to be applicable for the entire title (including section 129.2 creating the civil action) it seems that it should not be so applied.[31]

---

[24] Chambers v. Adams Express Co., 128 Iowa 154, 103 N.W. 152 (1905).

[25] IOWA CODE § 123.3 (1950).

[26] Woody v. Coenan, 44 Iowa 19 (1876).

[27] Now divided as indicated in notes 32, 33, and 34 *infra.*

[28] Jewett v. Wanshura, 43 Iowa 574 (1876); *see* Myers v. Conway, 55 Iowa 166 , 167, 7 N.W. 481, 481 (1880). The statute made such sales unlawful and provided a statutory penalty for violations. It expressly included beer in its definition of intoxicating liquors.

[29] See, *e.g.,* Lee v. Hederman, 158 Iowa 719, 138 N.W. 893 (1912); McVey v. Manatt, 80 Iowa 132, 45 N.W. 548 (1890); Huff v. Aultmann & Schuster, 69 Iowa 71, 28 N.W. 440 (1886); Richmond v. Shickler, 57 Iowa 486, 10 N.W. 882 (1881); Meyers v. Kirt, 57 Iowa 421, 10 N.W. 828 (1881); Macleod v. Geyer, 53 Iowa 615, 6 N.W. 21 (1880).

[30] Now found in Iowa Code § 125.2 (1950).

[31] A final answer to this problem would require a thorough briefing of rules of statutory construction in general, specifically for remedial legislation, and a study of the legislative history of the statutes affected. A review of SUTHERLAND, STATUTORY CONSTRUCTION §§ 1929, 2014, 2018, 4701, 4702, 4706, 4936, 5503-05, 7203 (3d ed., Horack, 1943), supports a conclusion that the amendment did not change the effect of section 129.2.

The intention of the legislature pervades the interpretation of statutes. The original section creating the civil action had a dual purpose: to supplement the rest of Title VI in suppressing intemperance, and to provide a remedy for innocent sufferers. Both objectives are still socially desirable in the minds of the general public, and are easily recognized in Iowa. The obvious purpose of the amendments in 1933 was to change the liquor control laws to allow the sale of beer, national prohibition having been repealed. The fact that no litigation involving section 129.2 had reached the supreme court for approximately twenty years immediately prior to 1933 is strong evidence that the legislature had no reason to reduce the effect of section 129.2, and likely were not aware of the possible effect of the sweeping amendment.

Assuming that beer is not arbitrarily excluded from the definition of intoxicating liquor for section 129.2, liability could arise under existing statutes for sales or gifts described as unlawful when made to minors,[32] intoxicated persons,[33] or persons in the habit of becoming intoxicated.[34]

Whereas section 129.2 now creates liability for sales *or gifts* of intoxicating liquors, for a time the statute only specified sales, and it remained for the court to construe application to gifts as well,[35] at least where furnished for pecuniary motives.[36] It has been considered a sale to the one intoxicated when purchased by a third person who treats the one intoxicated.[37] It is interesting that cases originating under other sections of Title VI have held the distribution of intoxicating liquors by a club[38] or organization[39] among its members a *sale*.

Proof of sales is usually made by the testimony of witnesses who observed the transactions, but may be made by circumstantial evidence.[40]

WHEN IS ONE INTOXICATED. While no Iowa cases have tested the meanings of the words "intoxicated person" and "intoxication" as applied under section 129.2, it is believed that the meanings should be substantially different from those used under criminal statutes.

Illinois has had several occasions to rule on this issue in cases arising under a nearly identical statute.[41] In *Osborn v. Leufgen*,[42] they note that "It is well known that the effect of alcohol upon all persons is not the same but may be widely different, and that an individual who has had only a slight amount to drink may in some instances be more dangerous than a person who shows signs of intoxication."[43] The court continued by quoting a Pennsylvania case[44] which defined intoxication as follows: "Whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated; although he can walk straight, . . . attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence

---

[32] IOWA CODE §§ 123.43, 125.7 and 124.20 (1950).
[33] IOWA CODE §§ 123.46 (3) and 125.7 (1950).
[34] IOWA CODE § 125.7 (1950).
[35] Welch v. Jugenheimer, 56 Iowa 11, 8 N.W. 673 (1881).
[36] Rafferty v. Buckman, 46 Iowa 195 (1877).
[37] Carrier v. Bernstein Bros., 104 Iowa 572, 73 N.W. 1076 (1898); Judge v. Jordan, 81 Iowa 519, 46 N.W. 1077 (1890).
[38] State v. Johns, 140 Iowa 125, 118 N.W. 295 (1908) (indictment for liquor nuisance).
[39] Shidler v. Tribe of the Sioux, 158 Iowa 417, 139 N.W. 897 (1913) (action seeking an injunction).
[40] Rafferty v. Buckman, 46 Iowa 195 (1877).
[41] ILL. REV. STAT. c. 43, § 135 (1951).
[42] 381 Ill. 295, 45 N.E.2d 622, 624 (1943).
[43] An instruction which quoted this sentence, in McClure v. Lence, 345 Ill. App. 158, 102 N.E.2d 546, 551 (1951), was held erroneous because of the inclusion of the words "well known."
[44] Elkin v. Buschner, 16 Atl. 102, 104 (Pa. 1888).

of liquor so as not to be at himself, so as to be excited from it, and not to possess that clearness of intellect and that control of himself that he otherwise would have, he is intoxicated."[45]

MUST THERE BE PROXIMATE CAUSE. As regards injuries alleged to have been caused "by any intoxicated person," the court has held that the intoxication need not be shown to have been the proximate cause of the injuries. In *Bistline v. Ney Bros.*,[46] now widely quoted by the courts in other jurisdictions and in encyclopedias, the court held that, as to injuries by any intoxicated person, it was not necessary to show that but for the intoxication the injury would not have happened.[47] In the same case, the court said that the statute indulges in a reasonable presumption that the action of the intoxicated person was the result of the intoxication.[48] This finding of a presumption of cause is on the theory that the statute was meant to create a right denied at common law as too remote.[49] Therefore, upon showing of unlawful sale, the intoxication, and the injury done "by any intoxicated person" while in that condition, a case is made out.[50] The only defense would be for the defendant to establish that the injurious act is *wholly* chargeable to some other cause or influence.[51]

For injuries which arise "in consequence of the intoxication" of any person, it is necessary to show that the intoxication was the proximate cause of the injuries.[52]

As regards the causal relationship necessary between the sales or gifts made by the defendant and the intoxication, they need not be the sole cause of the intoxication, and liability results from mere contributions.[53] However, the burden of proof that any alleged sales caused or contributed to the intoxication from whence injuries arose is on the plaintiff, and never shifts.[54]

DEFENSES. The protection given injured persons is quite broad and allows few defenses. However, one clear defense is that the plaintiff has contributed or consented to the intoxication.[55]

---

[45] See also Cook v. Kirgan, 332 Ill. App. 294, 75 N.E.2d 120 (1947).

[46] 134 Iowa 172, 111 N.W. 422 (1907) (suicide by intoxicated husband).

[47] *Id.* at 184-5, 111 N.W. at 426.

[48] *Ibid.*

[49] *Id.* at 179, 111 N.W. at 424. See the discussion of purpose in Rafferty v. Buckman, 46 Iowa 195, 201 (1877).

[50] Lee v. Hederman, 158 Iowa 719, 138 N.W. 893 (1912); Bistline v. Ney Bros., 134 Iowa 172, 111 N.W. 422 (1907); *cf.* Rafferty v. Buckman, *supra* note 49 (earlier case which did not distinguish between the two classes of injuries now recognized).

[51] See Bistline v. Ney Bros., 134 Iowa 172, 184, 111 N.W. 422, 426 (1907).

[52] *Ibid; accord,* Peterson v. Brackey, 143 Iowa 75, 119, N.W. 967 (1909). See 2 IOWA L. BULL. 224, 225 (1916).

[53] Welch v. Jugenheimer, 56 Iowa 11, 8 N.W. 673 (1881); Woolheather v. Risley, 38 Iowa 486 (1874). See Bunyan v. Loftus, 90 Iowa 122, 57 N.W. 685 (1894) for holding that word "contributed" has its ordinary meaning.

[54] Macleod v. Geyer, 53 Iowa 615, 6 N.W. 21 (1880).

[55] Engleken v. Hilger, 43 Iowa 563 (1876) (expressly didn't decide the case where defendant contributes to the habit of drinking, but not the intoxication complained of).

Even this has been weakened by holdings which avoid the defense when the plaintiff had a justifiable reason for contributing or consenting.[56] In *Jewett v. Wanshura*[57] the court avoided an express consent under circumstances which the court held should have advised the defendant that the plaintiff was not acting voluntarily.[58]

In a suit by the wife for loss of support due to numerous intoxications,[59] the court held that she should be denied only those damages sustained from intoxications to which she had contributed. The same case held that, where it is shown that the plaintiff gave her husband money with which to buy liquor, contribution by the plaintiff is not proven until the jury is satisfied that the husband obtained the liquor by means of such money.

It is no defense to an action for loss of support due to habitual drunkenness that the provider was already an habitual drunkard and for that reason had not been providing plaintiff support prior to the sale by the defendant.[60]

In *Bistline v. Ney Bros.*,[61] it was held no defense to an action for sale to an habitual drunkard that the defendant had no knowledge of the habits of the intoxicant. It was said that the defendant must know that the recipient is not an habitual drunkard or assume the risk of a sale.[62]

The defense of the statute of limitations is available, and the two years run from the time of the intoxication of which there is complaint.[63]

In *Rafferty v. Buckman*,[64] it is implied that a defendant might avoid liability for sales made by an agent after the defendant had given instructions that no sales be made to the one who has

---

[56] Huff v. Aultman & Schuster, 69 Iowa 71, 28 N.W. 440 (1886) (plaintiff returned portions of her husband's wages for purpose of buying liquor; held jury question whether she chose the lesser of two evils); Ward v. Thompson, 48 Iowa 588 (1878) (plaintiff took liquor home for husband "to keep him at home"); Kearney v. Fitzgerald, 43 Iowa 580 (1876) (same).

[57] 43 Iowa 574 (1876).

[58] While the plaintiff and her husband were in the defendant's place of business, the husband summoned the defendant and told him that the plaintiff had something to tell him. At that time the plaintiff withdrew an earlier comand that the defendant not sell to her husband.

[59] Rafferty v. Buckman, 46 Iowa 195 (1877).

[60] Knott v. Peterson, 125 Iowa 404, 101 N.W. 173 (1904) (clear holding as to action for loss of future support, questioned as to action for past support); League v. Ehmke, 120 Iowa 464, 94 N.W. 938 (1903); *see* page 470, 94 N.W. at 940, to effect it might be a defense that no support had been provided previously for some reason other than intoxication, though failure to support was caused to continue due to intoxication contributed to by the defendant; Woolheather v. Risley, 38 Iowa 486 (1874). *But see* Gustafson v. Wind, 62 Iowa 281, 283-4, 17 N.W. 523, 524 (1883).

[61] 134 Iowa 172, 111 N.W. 422 (1907).

[62] *Id.* at 174, 111 N.W. at 423. It was suggested that the defendant must "personally know that the recipient is not addicted to such a habit, or have written proof of such fact from some reputable third person."

[63] Emmert v. Grill, 39 Iowa 690 (1874).

[64] 46 Iowa 195, 198-9 (1877).

become intoxicated, if the jury were satisfied that the instructions to the agent were in good faith and were not just a pretense to avoid liability.

Settlements with and judgments against other contributors to the intoxication are admissible to aid in determining the portion of the damages caused by the defendant's sales, but not to mitigate the damages caused by the defendant.[65] Conversely, evidence of other *pending* suits, even covering the same grounds, is not admissible on the issue of damages for which the defendant is to be held liable.[66]

The statute provides recovery "for all damages actually sustained, as well as exemplary damages,"[67] from injuries "in person or property or means of support."

Injuries "in person" have been construed to mean "in body,"[68] and, therefore, no actual damages may be recovered for threatening or vulgar language, unless it results in an impairment of health.[69]

Wounded feelings, mental anguish, or shame and suffering which result from any violent interference with one's body would be grounds for damages.[70] However, wounded feelings and humiliation which result from loss of social standing cannot be made the foundation for a claim of damages,[71] nor are there grounds for recovery for loss of society and companionship of the husband.[72]

Few cases have involved injuries to property, and only in *Woolheather v. Risley*[73] was any issue made whether a certain item could be the subject of recovery. In that case it was held that absolute legal ownership in the plaintiff need not be proven, but only claim and treatment of the property as owner, and knowledge and recognition of the same by the one intoxicated prior to the wrongful sale.[74]

Many occasions have arisen for the Iowa court to consider issues involving what recovery could be had for injuries in "means of support." Basically, the dependents of the person caused to become intoxicated, habitually or otherwise, may recover the sup-

---

[65] Engleken v. Webber, 47 Iowa 558 (1877); Ennis v. Shiley, 47 Iowa 522 (1877).

[66] Mathre v. Devendorf, 130 Iowa 107, 106 N.W. 366 (1906); Ward v. Thompson, 48 Iowa 588 (1878).

[67] Exemplary damages discussed in the text at note 89.

[68] Calloway v. Laydon, 47 Iowa 456 (1877).

[69] Welch v. Jugenheimer, 56 Iowa 11, 8 N.W. 673 (1881); Calloway v. Laydon, *supra* note 68, at 458, said no difference whether directed to plaintiff personally or to a third person.

[70] Ward v. Thompson, 48 Iowa 588 (1878).

[71] Jackson v. Noble, 54 Iowa 641, 7 N.W. 88 (1880); *accord*, Fox v. Wunderlich, 64 Iowa 187, 20 N.W. 7 (1884); *see* Kearney v. Fitzgerald, 43 Iowa 580, 586 (1876).

[72] Dunlavey v. Watson, 38 Iowa 398 (1874).

[73] 38 Iowa 486 (1874).

[74] *Id.* at 492.

port which in fact has been deprived.[75] There has been considerable confusion over what evidence is admissible to establish the support deprived, and over what instructions should be given to the jury on the issue. Probably there should be consideration of the "circumstances and condition in life" of the plaintiff prior to the deprivation of support,[76] and evidence of "rank and station in life" or "social standing" is admissible.[77] However, it should be clear that the recovery is limited to what was within the ability of the provider prior to the intoxication,[78] and to an amount no more than had been provided.[79]

It is not clear just what prior period shall be used for measuring the support previously enjoyed. A defendant who merely contributes to the continuation of habitual drunkenness cannot avail himself of the fact that the one intoxicated had not supported the plaintiff just prior to the sales by the defendant.[80] While the plaintiff cannot allege any damages for any intoxication occurring more than two years previously, it is not logical to arbitrarily use that point as the measure of support to be restored. If this were done, a dependent would receive nothing where the provider had been an habitual drunkard and had not worked for more than two years. In *Huff v. Aultman & Schuster*,[81] the court approved the exclusion of evidence offered by the defendant that the plaintiff's husband had been an habitual drunkard for twenty years. The court simply held that such evidence ". . . offered for the purpose of affecting the measure of . . . damages" was incompetent for that purpose.[82] However, a later case, *Lee v. Hederman*,[83] made a distinction for cases involving loss of *future* support, and held evidence of the provider's past habits of sobriety as well as industriousness and economy was admissible.

Another issue in permanent disability or death cases involving loss of future support is the life expectancy of the provider. The

---

[75] Mathre v. Devendorf, 130 Iowa 107, 106 N.W. 366 (1906); Bellison v. Apland, 115 Iowa 599, 89 N.W. 22 (1902).

[76] Dunlavey v. Watson, 38 Iowa 398 (1874); *accord*, Rafferty v. Buckman, 46 Iowa 195 (1877) (instruction was not tested on the appropriateness of the words "circumstances and condition of life"); Thill v. Pohlman, 76 Iowa 638, 639-40, 41 N.W. 385, 386 (1889) (approved use of words included in "circumstances and condition in life," but supported its holding on *Rafferty v. Buckman, supra*, where the words were not tested). *But cf.* Bellison v. Apland, 115 Iowa 599, 600, 89 N.W. 22, 23 (1902) (purported to remove from consideration "what the husband ought to have done," but supported itself by citing *Dunlavey v. Watson, supra*, which approved consideration of "circumstances and condition in life").

[77] Thill v. Pohlman, 76 Iowa 638, 640, 41 N.W. 385, 386 (1889). *But cf.* Jackson v. Noble, 54 Iowa 641, 642-3, 7 N.W. 88, 89 (1880) (court disapproved of the evidence, but considered it as offered to show loss of social standing and consequent humiliation).

[78] Thill v. Pohlman, *supra* note 77.

[79] Cases cited note 75 *supra*.

[80] Woolheather v. Risley, 38 Iowa 486 (1874).

[81] 69 Iowa 71, 28 N.W. 440 (1886).

[82] *Id.* at 75, 28 N.W. at 442.

[83] 158 Iowa 719, 138 N.W. 893 (1912).

Iowa court early questioned the admissibility of tables of life expectancy, since such tables are made to show ordinary prospects, and the habits of the provider may have removed him from that classification.[84] However, later cases held such tables are generally admissible,[85] though they are not conclusive and should be considered in connection with evidence as to physical condition, vocation, and habits of the person.[86]

In actions brought by a wife alone for loss of support, only her personal support may be recovered, and evidence as to any children or their ages is inadmissible.[87] However, in a suit by a child, evidence of other children in the family would not prejudice the defendant, and probably would be relevant to the plaintiff's loss.[88]

The statute provides for recovery of "all damages actually sustained, as well as exemplary damages." It is agreed that exemplary damages are not available without a finding of actual damages, and the exemplary damages must arise out of the circumstances under which the actual damages are sustained.[89]

Early cases indicated that exemplary damages were discretionary with the jury,[90] but later cases have established that they are given as a matter of right and it is the duty of the jury to add exemplary damages whenever actual damages are awarded.[91] Even when viewed as discretionary it was held that it was not necessary that the plaintiff aver exemplary damages.[92]

It has been stated that exemplary damages are "punitive,"[93] and are given because the defendant was "guilty of malice and wantonness" for the very act of making the illegal sale.[94]

Probably the amount of exemplary damages could be affected by aggravating circumstances, such as continued sales after the plaintiff's protest,[95] after knowledge of injury to the plaintiff's

---

[84] See Rafferty v. Buckman, 46 Iowa 195, 200 (1877).

[85] Peterson v. Brackey, 143 Iowa 75, 119 N.W. 967 (1909); Knott v. Peterson, 125 Iowa 404, 101 N.W. 173 (1904).

[86] Peterson v. Brackey, *supra* note 85.

[87] Welch v. Jugenheimer, 56 Iowa 11, 8 N.W. 673 (1881); Huggins v. Kavanagh, 52 Iowa 368, 3 N.W. 409 (1879); *accord*, Bunyan v. Loftus, 90 Iowa 122, 57 N.W. 685 (1894); *cf.* Weitz v. Ewen, 50 Iowa 34 (1878). An exception exists under certain circumstances where relevant to exemplary damages; see text at note 98 *infra*.

[88] Shull v. Arie, 113 Iowa 170, 84 N.W. 1031 (1901).

[89] See Calloway v. Laydon, 47 Iowa 456, 459 (1877).

[90] Gustafson v. Wind, 62 Iowa 281, 17 N.W. 523 (1883); Goodenough v. McGrew, 44 Iowa 670, 671 (1876); see Weitz v. Ewen, 50 Iowa 34, 37 (1878) (sought special circumstances to justify exemplary damages).

[91] Peterson v. Brackey, 143 Iowa 75, 119 N.W. 967 (1909); Thill v. Pohlman, 76 Iowa 638, 41 N.W. 385 (1889); Fox v. Wunderlich, 64 Iowa 187, 20 N.W. 7 (1884).

[92] Gustafson v. Wind, 62 Iowa 281, 17 N.W. 523 (1883).

[93] Fox v. Wunderlich, 64 Iowa 187, 190-1, 20 N.W. 7, 8 (1884); Calloway v. Laydon, 47 Iowa 456, 459 (1877).

[94] Miller v. Hammers, 93 Iowa 746, 61 N.W. 1087 (1895); Fox v. Wunderlich, *supra* note 93.

[95] *See* Calloway v. Laydon, 47 Iowa 456, 459 (1877).

means of support,[96] after knowledge that the drinker was in the habit of becoming intoxicated,[97] or after notice that the intoxication endangered the home for the children.[98]

JUDGMENT AS LIEN ON PREMISES. Section 126.15 of the Code provides an ancillary remedy whereby a judgment holder may have the premises used for the illegal sale charged with a lien until the judgment is satisfied, if it can be shown that the owner knew of the wrongful use of the premises. Consequently, the practice has been to join the owner, if other than the defendant vendor or donor of the intoxicating liquor,[99] and it has been suggested that he "should" be joined.[100] However, the plaintiff has a right to secure his judgment against the vendor or donor, and later, in a separate action against the landlord, make the judgment a lien on the premises.[101]

If joined, the owner is entitled to contest the liability of the lessee.[102] If the owner is not joined in the first action, and the judgment holder seeks to charge the premises with a lien, the judgment is not conclusive and the plaintiff must reprove the elements of his initial case.[103]

A joint action should be tried at law before a jury[104] unless some factor such as lien priorities makes the remedy at law inadequate.[105]

The lien attaches when the judgment is rendered,[106] except as to a justice court judgment, to which it has been held the act does not apply.[107]

At one time the statute required a showing of knowledge of the illegal use of the premises by the lessee, *and consent* thereto,[108] but the courts were willing to find consent from circum-

---

96 *Ibid.*

97 *See* Goodenough v. McGrew, 44 Iowa 670, 670-1 (1876).

98 Ward v. Thompson, 48 Iowa 588 (1878).

99 Discussed in the text at note 19 *supra.*

100 Buckham v. Grape, 65 Iowa 535, 539-40, 17 N.W. 755, *aff'd on rehearing,* 65 Iowa 535, 22 N.W. 664, 665 (1885).

101 McVey v. Manatt, 80 Iowa 132, 45 N.W. 548 (1890); LaFrance v. Krayer, 42 Iowa 143 (1875) .

102 Loan v. Hiney and Etzell, 53 Iowa 89, 4 N.W. 865 (1880).

103 McVey v. Manatt, 80 Iowa 132, 45 N.W. 548 (1890) (held necessary to justify the judgment, and a strong dissent declared that the legislature intended the judgment to be conclusive on damages); Buckham v. Grape, 65 Iowa 535, 17 N.W. 755, *aff'd on rehearing,* 65 Iowa 535, 22 N.W. 664 (1885).

104 Loan v. Hiney and Etzell, 53 Iowa 89, 4 N.W. 865 (1880).

105 Buckham v. Grape, 65 Iowa 535, 17 N.W. 755, *aff'd on rehearing,* 65 Iowa 535, 22 N.W. 664 (1885); *accord,* Loan v. Hiney and Etzell, 53 Iowa 89, 91-2, 4 N.W. 865, 866-7 (1880).

106 Goodenough v. McCoid and Phillips, 44 Iowa 659 (1876). *Cf.* Weir v. Day, 57 Iowa 84, 10 N.W. 304 (1881) (setting aside fraudulent conveyance).

107 *Cf.* State v. McCulloch, 77 Iowa 450, 42 N.W. 367 (1889) (action originated under different section of title, also expressly did not rule whether lien would arise upon the filing of a certified transcript in the office of the clerk of the district court).

108 See Wing v. Benham, 76 Iowa 17, 19, 39 N.W. 921, 923 (1888).

stances which properly called for a protest by the lessor after receiving knowledge of the unlawful use of the premises,[109] though not from knowledge alone.[110]

Later the section was rewritten and the requirement of consent was removed, leaving knowledge as the only necessary averment.[111] Though earlier cases implied that the knowledge required was of the illegal sale(s) complained of by the plaintiff,[112] it has since been ruled that it refers to knowledge of prior unlawful use,[113] and that knowledge may be found from general reputation of the place.[114] In *Arnold v. Barkalow*[115] it appeared that some of the alleged sales were made before knowledge of any unlawful use was received by the lessor. The court suggested that the lessor might have asked that the damages be separated accordingly, but questioned even then whether the judgment could be split up and only a part be made a lien on the premises.[116]

The lien created does not affect homestead property, but it may be that part of a building would not be exempt.[117]

---

[109] Loan v. Etzell, 62 Iowa 429, 17 N.W. 611 (1883).
[110] Cox v. Newkirk, 73 Iowa 42, 34 N.W. 492 (1887).
[111] See Judge v. Flournoy, 74 Iowa 164, 165, 37 N.W. 130, 131 (1888).
[112] Myers v. Kirt, 64 Iowa 27 ,29-30, 19 N.W. 846, 847-8 (1884) (strong dissent); *see* Loan v. Etzell, 62 Iowa 429, 431, 17 N.W. 611, 612 (1883).
[113] Wing v. Benham, 76 Iowa 17, 39 N.W. 921 (1888) (distinguished Myers v. Kirt, *supra* note 112, as a case where there was no showing of prior business which was generally unlawful); Judge v. O'Connor, 74 Iowa 166, 37 N.W. 131 (1888).
[114] Iowa Code § 126.17 (1950); Johnson v. Grimminger, 83 Iowa 10, 48 N.W. 1052 (1891); *accord*, Judge v. O'Connor, *supra* note 113.
[115] 73 Iowa 183, 34 N.W. 807 (1887).
[116] *Id.* at 186, 34 N.W. at 809.
[117] Arnold v. Gotshall, 71 Iowa 572, 32 N.W. 508 (1887); *see* Engleken v. Webber, 47 Iowa 558, 561-562 (1877).

AN ANOMALY IN CRIMINAL APPEAL

As mentioned in a previous article,[1] the Supreme Court of Iowa by way of dictum stated in *State v. Rosenberg*[2] that Rule of Civil Procedure 344 (a),[3] which sets out the form and contents of briefs, is made applicable to appeals in criminal cases by section 793.17 of the Iowa Code. *State v. Mead*[4] was cited as authority for this proposition. An examination of *State v. Mead* reveals that the court did not make even the barest mention of section 793.17. The opinion did, however, state that errors assigned which are not argued are deemed waived, and it is obvious that this is the precise point the court had in mind in *State v. Rosenberg.* It is true that Rule 344 (a) (4) (Third) so provides, but *State v. Mead* relied on case precedent[5] and did not cite Rule 344. It is clear that the proposition was well established in the cases long before Rule 344 was adopted.

Granted that the court in the *Rosenberg* case had ample authority for the proposition that errors assigned but not argued are deemed waived, a question remains as to the validity of the statement that Rule 344 is made applicable to criminal appeals by section 793.17. This section provides:

> The record and case may be presented in the supreme court by printed abstracts, arguments, motions, and petitions for rehearing as provided by its rules; and the provisions of law in civil procedure relating to certification of the record and the filing of decisions and opinions of the supreme court shall apply in such cases.

The first part of this section would seem to be directory rather than mandatory because it reads: "The record and case *may* be presented . . ." (Emphasis added.) The second part, on the other hand, might be construed to be mandatory because it states: "*shall apply.*" Clearly this mandatory portion of section 793.17 in no way provides that Rule 344 shall govern in criminal cases. This portion of the section expressly makes applicable to criminal appeals only those provisions of civil procedure relating to (1) "certification of the record" and (2) "the filing of decisions and opinions of the supreme court."

If it be assumed that the first part of section 793.17 is mandatory and not directory, the question still remains whether it can be construed to mean that the form and contents of a brief in a criminal appeal will be governed by Rule 344. It is submitted that the terms "printed abstract, arguments, motions, and petitions

---

[1] 2 DRAKE L. REV. 9, n. 1 (1952).
[2] 238 Iowa 621, 630, 27 N.W.2d 904, 909 (1947). See also State v. Thompson, 239 Iowa 907, 33 N.W.2d 13 (1948).
[3] Hereafter referred to as Rule 344.
[4] 237 Iowa 475, 22 N.W.2d 222 (1946).
[5] State v. Harding, 204 Iowa 1135, 216 N.W. 642 (1927); State v. Neifert, 206 Iowa 384, 220 N.W. 32 (1928).